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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DEREK ANDRE BROWN, Defendant and Appellant.	2d Crim. No. B217690 (Super. Ct. No. 2008018651; 2006024830) (Ventura County)

Derek Andre Brown appeals from judgment after conviction by jury for assault with intent to commit rape. (Pen. Code, § 220.)[1] The jury found untrue an allegation that he used a deadly weapon during the assault, but found that he did suffer a prior conviction for carjacking. (§ 215.) The court sentenced appellant to 13 years in state prison consisting of the midterm, doubled for the prior strike (§1170.12, subd. (c)(1)), plus 5 years for the prior serious felony conviction (§ 667, subd. (a)(1)). It also sentenced appellant to a concurrent five-year term for violation of his probation in the carjacking case.

[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant contends that his conviction for assault with intent to commit rape must be reversed because there was no evidence from which the jury could infer the requisite intent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim was alone in the laundry room of her apartment on an early morning in May 2007. She turned and saw appellant. She tried to leave the room but he pushed her back. He closed the door. He held a yellow-handled tool. He told her to be quiet and he covered her mouth with his hand. She struggled and he grabbed her jeans, pulling at the button. He grabbed her pants and it seemed to her that he was trying to pull them down. She "moved [her] knees to stop him from pulling [her] pants down." She believed that she was going to be raped. He did not ask for money and did not reach into her pockets where she had quarters. She was wearing jewelry that he did not try to take. He punched her in the stomach with a closed fist and pushed her to the floor. He leaned over her and held her down. While she was on the ground, she was still struggling to keep her pants on by moving her knees. She continued to struggle for about 10 minutes until he left.

After the attack, she ran to her apartment and to her husband. She was still fully clothed but the button of her pants was undone. She had a scratch on her face and her hand was cut and bleeding. When she returned to the laundry room with police, they found a yellow-handled tile scraping tool. She identified appellant in a photographic line up after the attack and in the courtroom. DNA matching appellant's was found on the tool.

The court instructed the jury on assault with intent to commit rape and simple assault. On the following day, the jury asked for the victim's testimony to be read back, which it was. On the next day, the jury sent two notes to the court. The first asked, "Do we have to have unanimity on the higher charge before we move to the lesser charge?" The court responded, "Yes - see instructions." The second note stated, "We are unable to come to a unanimous consensus on the first charge and are

thus unable to move to the second charge. We are hopelessly deadlocked on this." The court's response was not recorded. Later that day, the jury found appellant guilty of the greater offense: assault with intent to commit rape. The jury then found true the allegation that appellant suffered a prior conviction in 2007 for carjacking in Ventura.

DISCUSSION

Appellant contends that his conviction was not supported by any evidence of intent to commit rape. We disagree because a reasonable jury could have inferred his intent to commit rape from his persistent efforts to forcibly remove his victim's pants.

We must determine whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We presume the existence of every fact that the trier of fact could reasonably infer from the evidence. (*Ibid.*) We must determine whether there is substantial evidence to sustain the implied findings. Substantial evidence is evidence which is reasonable, credible, and of solid value. (*Ibid.*) A finding of fact may not be based solely on suspicion, imagination, speculation or guess work. (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

Assault with intent to commit rape requires the specific intent to engage in sexual intercourse against the victim's will. (§§ 220, subd. (a), 261, subd. (a)(2); *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1222.) "The offense is complete if at any moment during the assault the accused intends to use whatever force may be required" to complete the act. (*People v. Meichtry* (1951) 37 Cal.2d 385, 388-389.) Abandonment of intent to rape before consummation of the act does not negate the felonious nature of the assault. (*Trotter*, at p. 1222.)

The question whether the requisite intent existed is one for the jury to determine "from the conduct of the defendant and the surrounding circumstances."

(*People v. Meichtry, supra,* 37 Cal.2d at p. 389; *People v. Craig* (1994) 25 Cal.App.4th 1593, 1597.) We will not interfere with that determination unless "the facts afford no reasonable ground for an inference that the intent existed." (*Meichtry,* at p. 389.)

In *People v. Craig, supra,* 25 Cal.App.4th 1593, there was sufficient evidence of specific intent to commit rape to sustain the conviction for assault with attempt to commit rape where the defendant confronted his victim in her driveway, told her to put her hands on top of her car, grabbed her hair, pushed her into the driver's seat, and shoved a hand inside her sweater, and laid his hand flat on her breasts outside her bra. The victim's housemate ran to her aid and pulled the defendant off. (*Id.* at p.1596.) The defendant argued on appeal that there was only evidence of intent to commit a sexual battery, but the reviewing court concluded that the conduct was consistent with an inference of specific intent to commit rape. (*Id.* at pp. 597, 1604.) Here too, appellant's forceful efforts to pull down the victim's pants after he shut her in the laundry room and knocked her to the floor were consistent with intent to rape her.

Appellant makes much of the fact that he did not disrobe or fondle the victim, but the fact that she stopped him by bending her knees and struggling did not negate his intent. The test for determination of intent to commit rape does not require proof of particular conduct. (*People v. Meichtry, supra,* 37 Cal.2d at p. 389 [test for determination of intent is whether, in light of defendant's conduct and surrounding circumstances, he intended to complete the act against the victim's will; the test does not require exposure, sexual capacity or outcry as an element].)

People v. Mullen (1941) 45 Cal.App.2d 298, cited by appellant, sheds no light on our analysis. It reflects the outmoded view that a "man may generously employ all [the] arts [of seduction] with force" and not be guilty of assault with intent to commit rape, as long as he eventually "abandon[s] his prey." (*Id.* at p. 300.) This

has not been the state of the law for more than half a century. (*People v. Trotter, supra,* 160 Cal.App.3d at p. 1223.)

We recognize that sexually motivated nonconsensual physical contacts do not always rise to the level of assault with intent to commit rape. There must be evidence that the defendant intends to use whatever force is required to rape the victim. (*People v. Trotter, supra,* 160 Cal.App.3d at p. 1222.) Moreover, a distinction is drawn between intent to commit rape and intent to seduce or to satisfy sexual interest with conduct that falls short of intercourse. (*People v. Greene* (1984) 34 Cal.App.3d 622, 651.) In *Greene,* for example, a young man walked up to a 16 year old girl on the street and put his hand around her waist. He said, "Don't be afraid. I have a gun. Don't move." (*Id.* at p. 629.) He told her to put her arm around his waist, which she did, and they walked. He said, "I just want to play with you" and he moved his hand "up and down her waist a little." (*Ibid.*) She broke away and ran to a neighbor's home. This "simple touching" could not be transformed into assault with intent to commit rape by the victim's subjective belief that "play" meant sexual intercourse. (*Id.* at p. 651.) Evidence of incidents with other victims furnished "some support for a finding that the sexual gratification the defendant sought . . . was sexual intercourse," but there was lacking "any persistent display of force." (*Id.* at p. 652.)

Here, there was evidence of persistent use of force to overcome the victim's will. She testified that appellant forced her to the ground with a punch to the stomach and held her there for about 10 minutes while he tried to pull her pants down. "In objectively assessing a defendant's state of mind during an encounter with a victim, the trier of fact may draw inferences from his conduct . . . ." (*People v. Bradley* (1993) 15 Cal.App.4th 1144, 1154, disapproved on other grounds in *People v. Rayford* (1994) 9 Cal.4th 1, 21-22.) While other reasonable inferences may have been possible, the evidence supported the jury's implied finding that appellant

intended to use whatever force was required to engage in sexual intercourse with the victim against her will.[2]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

[2] In sustaining the conviction, we do not rely on evidence that the victim believed she was going to be raped. Only the state of mind of the defendant is in issue. (*People v. Greene, supra,* 34 Cal.App.3d at p. 651.)

John E. Dobroth, Judge

Superior Court County of Ventura

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